SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-184

PATRICK J. LUCEY, et al.,
Petitioners,

v.

THOMAS E. LISTER, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The facts are correctly stated in the Opinion for the Court of Appeals, 575 F. 2d 1325 (7th Cir. 1978), of which Petitioners seek review in this court. (A. 101-110) We would respectfully direct the Court's attention to the Opinion because it presents a complete discussion of all of the facts rather than relying upon the Statement of the Case set forth in the Petition which, at best, is incomplete.

REASONS FOR NOT GRANTING CERTIORARI

I. Petitioners Seek Review of a Non-Final Judgment.

The record in this case reveals that the complaint was dismissed by the District Court. The Court of Appeals reversed the order dismissing the complaint and remanded the case for trial. The Supreme Court will not grant certiorari to review such a non-final judgment in the absence of some exceptional reasons. *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893). In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. 251, 258 (1916), the Court stated that lack of finality of itself alone furnished sufficient ground for the denial of certiorari. In *Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.*, 389 U.S. 327 (1967) the Court indicated that because the Court of Appeals remanded the case it was not ripe for review.

Petitioners have failed to show any exceptional circumstances to justify review by this court of a non-final determination by the Court of Appeals.

II. Petitioners Seek To Involve This Court in an Interpretation of Wisconsin Procedural Law And Present Questions Not Presented to The Court of Appeals.

In the Questions Presented and in Section I of the Petition, Petitioners argue that Respondents exceeded the directions of the District Court by joining a cause of action for money had and

received with an action for declaratory relief when their action was brought in the Circuit Court for Dane County, Wisconsin, pursuant to the abstention order of the District Court. They then allege, without citation of any legal authority, that had Respondents asked solely for declaratory relief, it would have been granted by the state courts. The Questions Presented and Petitioner's arguments have no support in fact, are based upon an erroneous view of Wisconsin procedural law and were not presented to the Court of Appeals.

Relating to the facts, Petitioners neglect to inform the court that at the time the action was filed in state court, there were decisions of the Circuit Court for Dane County which recognized that the legislative claim procedure was not required in non-resident tuition cases (Doc. 29, Exh. C). At the time the state action was filed, Respondents sought to obtain not only a declaratory judgment but money damages in order to obtain a complete disposition of the action on state law grounds (Doc. 29, Exh. D). With respect to the claims for declaratory relief in state court, Petitioners argued that there was no case or controversy because the respondents had graduated from the University. With respect to the money damages, they argued that a claim to the Wisconsin Legislature was necessary (Doc. 29, Exh. A and B). In the Wisconsin Supreme Court, Respondents argued that declaratory relief should have been granted pursuant to the District Court's abstention order because the order itself created a case or controversy with respect to the interpretation of Wis. Stats. sec. 36.16 (Doc. 30, pp. 13-14, 25-26). In *Lister v. Board of Regents*, 72 Wis. 2d 282, 305-310, 240 N.W. 2d 610, 623-626 (1976) (Doc. 31, Exh. A), the Wisconsin Supreme Court accepted Petitioners'

arguments, holding that a declaratory judgment could not be obtained because the Respondents had graduated from law school and the only questions remaining would involve money damages.

Petitioners have no support for their argument that had the Respondents sought only declaratory relief in the state courts that such declaratory relief would have been granted. Joinder of the damage claim was not a basis of the state court's refusal to construe the statute. Wisconsin's procedural law is similar to the Federal Rules of Civil Procedure permitting liberal joinder of claims. There is nothing in Wisconsin Rules of Civil Procedure or in the case law of Wisconsin known to the undersigned counsel that would support Petitioners' theory that the Wisconsin courts would have granted declaratory relief to Respondents had they not sought damages in a separate count of the state court complaint. Nor have Petitioners cited any authority to support their theory.

Finally, Petitioners' theory was not presented to the Court of Appeals. Petitioners argued in that Court that Respondents should have presented their claim before the Wisconsin Claims Board and the Legislature, and that the District Court was justified in dismissing the complaint because Respondents made the wrong guess as to how the Wisconsin Courts would rule upon the procedural questions ultimately determined. Thus, this Court should not consider Petitioners' theory since it was not briefed, argued or decided by the Court of Appeals. *California v. Taylor,* 353 U.S. 553, 557 (1957); *Lawn v. United States,* 355 U.S. 339, 362 (1958); *Neely v. Eby Construction Co.,* 386 U.S. 317, 330 (1967). Until filing this Petition for Certiorari, Petitioners did not claim that Respondents could have obtained declaratory relief by omitting the damage claim from the state court complaint.

III. The Decision of The Court of Appeals Does Not Conflict With Any Decision of This Court.

Petitioners' argument of conflict in the decision of the Court of Appeals with decisions of this court is without merit. Petitioners' argument is that respondents caused the delay by requesting money damages in state court instead of confining their complaint to an action for declaratory relief. Petitioners then suggest that delay was the primary factor considered by the Court of Appeals in holding that the District Court should now consider this case on its merits.

The Court of Appeals considered other factors than the delay. These factors include the imposition of the requirement that administrative remedies be exhausted in a civil rights case. The Court of Appeals relied upon statements of the Wisconsin Supreme Court that the case was not important enough for it to use its inherent authority to decide the statutory issues. (App. 113). See *Lister v. Board of Regents,* 72 Wis. 2d 282, 309-10; 240 N.W. 2d 610, 626 (1976). The Court of Appeals also found no basis for the conclusion of the District Court that there was a bona fide question of statutory interpretation. None of these important abstention factors were discussed in the Petition for Certiorari, all of which should be considered in a decision of whether or not to abstain. *Railroad Comm'n. v. Pullman Co.* 312 U.S. 496 (1941); *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974); *Baggett v. Bullitt,* 377 U.S. 360 (1964); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971); *Zablocki v. Redhail,* — U.S. —, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978).

Nor is there any interference with the public policy of Wisconsin. As noted by the Wisconsin Supreme Court, this case was not important enough for it to interpret sec. 36.16, Wisconsin Statutes. That statute has now been repealed, and replaced with a materially different statute which governs non-resident tuition. The cases cited by petitioners, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959), are totally inopposite as they concern state regulation of oil and gas and eminent domain. As recognized in *Zablocki v. Redhail*, — U.S. —, 98 S.Ct. 673, 54 L.Ed. 2d 618 (1978), and *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 815-16 (1976), there is no doctrine requiring abstention because resolution of a federal question may result in overturning state policy.

Finally, it was Petitioners who caused the delays. Petitioners seek to impose additional delays by suggesting that Respondents appeal the denial of Respondents' claims from the Legislature to the state court. This would not be an effective remedy because the state court has authoritatively construed sec. 36.16, Wis. Stats. to deny similiar claims in *Hancock v. Regents*, 61 Wis. 2d 484, 213 N.W. 2d 45 (1973). Finally, had Petitioners really been interested in obtaining a construction of the statute in state court, they could have waived the Claims Board requirement, or at least joined in Respondents' request that the state courts construe the statute.

IV. No Important Federal Question Is Presented.

The only argument presented in the Petition which has not been considered by this Court are the circumstances which justify vacating an abstention order after the state courts have refused to act. In addition to this case, the question was considered in *United Services Life Ins. Co. v. Delaney*, 328 F. 2d 483 (5th Cir. 1964) *cert. denied*, 377 U.S. 935 (1965), and in *414 Theatre Corp. v. Murphy*, 499 F. 2d 1155 (2nd Cir. 1974). These cases all stand on their particular facts. There is no conflict among the circuit courts, nor any reason to justify the expenditure of this Court's time to set forth more particular guidelines for vacating abstention orders.

Petitioners also argue that they are protected by the Eleventh Amendment and executive immunity. As the Court of Appeals correctly pointed out, these arguments constitute defenses which must be pleaded, proven and considered by the District Court after trial on the merits.

V. The District Court Abused Its Discretion in Dismissing The Complaint.

The record in this case shows that Petitioners have made every effort to obtain adjudication of the state issues in the state courts. These efforts were frustrated in the state courts by procedural decisions which changed the law of Wisconsin as it existed when the state court action was filed. The District Court found that Respondents made their efforts "in good faith" (App. 124). Having made

that determination, it was an abuse of discretion to dismiss the complaint. Unlike *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), there was no disregard by Petitioners or counsel of any orders, scheduling deadlines or other requirements imposed by the rules or by the District Court. Nor are we aware of any authority to sustain dismissal of this action.

CONCLUSION

Respondents respectfully request that the Petition for Certiorari be denied in all respects.

Respectfully submitted,

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